JEFFERSON CIRCUIT COURT

TWELFTH DIVISION

No. 231158

JOHN W. MCTIGHE - - - - - - *Plaintiff*

v.

UNIVERSITY OF THE AMERICAS FOUNDATION, INC., et al. - - - - - - - *Defendants*

ORDER OF DISMISSAL—Entered November 21, 1977

On motion of the defendants, University of the Americas Foundation, Inc., Fernando Macias Rendon, Dr. Harold L. Kirkpatrick and Edward Simmen, and the Court having considered the arguments of counsel, and the Court being of the opinion that it does not have jurisdiction either over the subject matter or the person in this litigation and of the opinion further that the action has been brought in an improper venue, IT IS HEREBY ORDERED that the Complaint be dismissed, with prejudice, at the cost of the plaintiff.

(s) Witten
Judge, Jefferson Circuit Court

OPINION RENDERED: AUGUST 25, 1978
NOT TO BE PUBLISHED

COURT OF APPEALS OF KENTUCKY

No. 78-CA-109-MR

JOHN W. MCTIGHE - - - - - - *Appellants*

v.

UNIVERSITY OF THE AMERICAS FOUNDATION, INC.,
FERNANDO MACIAS RENDON,
DR. HAROLD L. KIRKPATRICK,
EDWARD SIMMEN - - - - - - - - *Appellees*

Appeal from Jefferson Circuit Court
Honorable Curtis G. Witten, Judge
Civil Action No. 231158

AFFIRMING

BEFORE: WILHOIT, REYNOLDS and HOWERTON, Judges.

REYNOLDS, JUDGE. This is an appeal from an order of Jefferson Circuit Court dismissing appellant's complaint for lack of subject matter jurisdiction, lack of personal jurisdiction and improper venue.

Appellant, John W. McTighe, a Kentucky resident, enrolled in graduate school at the University of the Americas in Puebla, Mexico, in the fall of 1972 to pursue a Master of Arts degree in Latin American history. While it appears from the record that he completed the scholastic requirements for a Master's degree in 1976, the University declined to award him a degree. Apparently, the basis for this re-

fusal was appellant's alleged participation in a teachers' strike at the University, which caused disruption for a time and eventually led to the closing of the school's liberal arts department and the firing of many employees and professors. One of appellant's undergraduate professors at Brescia College, Sister Rose Jean Powers, at appellant's request, wrote the University requesting both an explanation for the school's failure to award the degree and any reasons which might be known why she should not recommend him for a job in the secondary teaching field. Edward Simmen, Director of Graduate Studies at the school, responded, in part, to the inquiries as follows:

> Perhaps, I better than anyone, now know more of what happened during the crisis which we had here. A nucleus of employees and students aligned themselves with Communist elements that openly tried to close this private institution and nationalize it. I have been for the last six months conducting research in order to write the official history of the occupation that nearly destroyed this University.
>
> Mr. McTighe, as a foreigner in this country, did a very foolish thing when he became involved in a political entanglement. I, myself, would not recommend anyone who was involved in the attempt to overthrow the school and turn it over to elements which would alter it for political reasons. And I will not permit Mr. McTighe to hide behind a veil of innocence. From my research, I now know that the aims to destroy us were common knowledge. I, personally, would not recommend anyone of that inclination to teach in any school or, for that matter, hold any position where confidence is a requirement.

After several months of unsuccessfully attempting to obtain his degree, appellant filed suit against the University

of the Americas Foundation, Inc., a Delaware corporation, Fernanda Macias Renden, Rector of the University, Dr. Harold L. Kirkpatrick, Vice-Rector, and Edward Simmen, Director of Graduate Studies. The individual appellees are residents of Mexico.

Appellant raises two issues: whether the circuit court erred in finding that it did not have personal jurisdiction over the non-resident appellees, thereby dismissing appellant's complaint; and whether Kentucky is the proper and convenient forum.

Appellant maintains that personal jurisdiction is proper on any of three grounds included in K.R.S. 454.210:

(1) Transacting business within the state. K.R.S. 454.210(2)(a)(1);

(2) The commission of a tortious act within the state, K.R.S. 454.210(2)(a)(3); and

(3) Breach of an express or implied warranty, K.R.S. 454.210(2)(a)(5).

The contention that the University and its agents breached an expressed or implied warranty under KRS 454.210-(2)(a)(5) is without merit. The statute provides that the breach must occur in the sale of *goods outside* the Commonwealth or *services rendered* in the Commonwealth. We find all services were rendered in Mexico.

As to the argument that appellant transacted business in the Commonwealth within the purview of K.R.S. 454.210(2)(a)(1), the evidence presented by appellant was that he had received numerous correspondence from the University of the Americas, had sent tuition fees upon request to the University by checks drawn on Kentucky banks, and had studied literature in libraries sent into Kentucky by the University. Given these limited contracts, personal jurisdiction cannot be obtained. In *Davis H. Elliot* v.

Caribbean Utilities Company, Ltd., 513 F. 2d 1176 (6th Cir. 1975), the Sixth Circuit Court of Appeals held that the limits of personal jurisdiction conferred by K.R.S. 454.210-(2)(a)(1) are coextensive with the boundaries of the due process clause. The opinion, based on the minimum contacts concepts of *International Shoe Co.* v. *Washington*, 326 U. S. 310 (1945), as applied in *McGee* v. *International Life Insurance Co.*, 355 U. S. 220 (1957), and *Hanson* v. *Denckla*, 357 U. S. 235 (1958), set forth a three-point test for determining the constitutional outer limits of personal jurisdiction:

> First, the defendant must purposefully avail himself of the privilege of acting in the forum state or causing a consequence in the forum state. Second, the cause of action must arise from the defendant's activities there. Finally, the acts of the defendant or consequences caused by the defendant must have a substantial enough connection with the forum state to make the exercise of jurisdiction over the defendant reasonable. *Elliot, supra*, at p. 1181.

Under this test it would be improper to base jurisdiction over the University or its agents upon K.R.S. 454.210-(2)(a)(1). Further, appellant's action for breach of warranty, based upon the failure to award a degree in Mexico, cannot properly be brought under K.R.S. 454.210(2)(a)(1) since the cause of action did not arise from any transaction of business within this state. K.R.S. 454.210(2)(b).

Appellant's contention that personal jurisdiction can be obtained pursuant to K.R.S. 454.210(2)(a)(3) is likewise without merit. Jursidiction under this subsection is obtained when there is a tortious injury by an act or omission in this Commonwealth. We agree that if the letter had been of a nonprivileged nature it could have possibly formed the basis for a cause of action since the letter was

unsealed and therefore published in this Commonwealth. *Fordson Coal Co.* v. *Carter,* 269 Ky. 805, 108 S. W. 2d 1007 (1937). However, a motion to dismiss was filed pursuant to CR 12.02 and asserted that the pleadings failed to state a claim upon which relief could be granted. That rule provides that the motion "shall be treated as one for summary judgment and disposed of as provided for in Rule 56." The trial court considered the letter written by Sister Powers, requested by appellant, as well as the response elicited from Simmen, and it was proper for the court to determine that the correspondence was qualifiedly privileged so as to defeat jurisdiction pursuant to K.R.S. 454.210(2)(a)(3). We note that while carbon copies of the letter were mailed, none would have been mailed in this Commonwealth that were not qualifiedly privileged. Since there was but one limited publication in this state, and this was an answer fairly made by a person in the dicharge of a duty in the conduct of his own affairs and about matters where his interest was concerned, whether the letter was privileged is clearly to be determined by the court as an issue of law. W. Prosser, *Torts* § 115 (4th ed. 1971). The general rule is that a publication procured or invited by the plaintiff or his authorized agent is privileged. This is particularly true where the answer of the defendant does not go beyond the plaintiff's questions. 53 C.J.S. *Libel & Slander* § 95. Further, the person inquired of on a privileged occasion must be fair to the person making the inquiry, and if he has information, regardless of whether he has investigated it or not, the statement that the information has come to him, honestly made, is privileged. 53 C.J.S. *Libel & Slander* § 93. Here there was no allegation, until this appeal, that the letter was not written in good faith or with actual malice. Under the circumstances of this particular case, we feel the communication was privileged. *Bushett* v. *Crossfield,* 190 Ky. 751, 228 S. W. 673

(1921). Therefore, there was no tortious injury within this state, and jurisdiction could not be based on K.R.S. 454.210-(2)(a)(3).

Even if jurisdiction could have been obtained over the persons of the defendants, the doctrine of forum non conveniens is a proper basis for the lower court's decision. When a court believes that the action before it may be more appropriately and justly tried elsewhere, it may decline to exercise jurisdiction over a transitory cause of action. The primary factors governing such a decision are set out in *Gulf Oil Corp.* v. *Gilbert,* 330 U. S. 501 (1947), which was cited to this court by both parties in support of their positions. The problems of which appellant complains occurred in Mexico. The individual appellees reside there, and all of the witnesses, other than Sister Powers, either reside there or were members of the faculty or were students there. Appellant chose to be a student there and should not now complain of the inconveniences of having to litigate his problems there. In this case there is an alternative forum available to appellant in which he may litigate his claim. See *Carter* v. *Netherton,* Ky., 302 S. W. 2d 382 (1957).

The judgment is affirmed.

ALL CONRUR.

Attorney for Appellant:

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COURT OF APPEALS OF KENTUCKY

78-CA-109-MR

JOHN W. McTIGHE - - - - - - *Appellant*

v.

UNIVERSITY OF THE AMERICAS FOUNDATION, INC.,
FERNANDO MACIAS RENDON,
DR. HAROLD L. KIRKPATRICK,
EDWARD SIMMEN - - - - - - - *Appellees*

Appeal from Jefferson Circuit Court
Honorable Curtis G. Witten, Judge
Civil Action No. 231158

ORDER DENYING PETITION FOR REHEARING

BEFORE: HOWERTON, REYNOLDS, and WILHOIT, Judges.

The Court having considered the Petition for Rehearing and being sufficiently advised, it is ORDERED that the same is hereby DENIED.

(s) J. William Howerton
Judge, Court of Appeals

Entered: October 20, 1978

[LETTERHEAD OF CLERK OF COURT OF APPEALS]

CERTIFICATION

I, John C. Scott, Clerk, do hereby certify that the foregoing ORDER OF DISMISSAL of the Jefferson Circuit Court entered November 21, 1977; AFFIRMING opinion rendered August 25, 1978; ORDER DENYING PETITION FOR REHEARING entered October 20, 1978 in the case of John W. McTighe Vs. University of the Americas Foundation, Inc.; Fernando Macias Rendon, Dr. Harold L. Kirkpatrick, Edward Simmen (file no. 78-CA-109-MR) is a true and correct copy as same appears in my office.

Done this 7 day of November, 1978 at Frankfort, Kentucky.

John C. Scott, Clerk
By: (s) Shelley L. Ellis, Deputy Clerk
Court of Appeals of Kentucky

SUPREME COURT OF KENTUCKY

78-SC-598-D
(78-CA-109-MR)

JOHN W. McTIGHE - - - - - - - - *Movant*

v.

UNIVERSITY OF THE AMERICAS FOUNDATION, INC., ET AL. - - - - - - - - - *Respondents*

Jefferson Circuit Court
#231158

ORDER DENYING DISCRETIONARY REVIEW

The motion of John W. McTighe for a review of the decision of the Court of Appeals is denied, and the decision stands affirmed.

Entered March 13, 1979.

(s) John S. Palmore
Chief Justice

[LETTERHEAD OF CLERK OF SUPREME COURT OF KENTUCKY]

I, Martha Layne Collins, Clerk of the Supreme Court of Kentucky, do hereby certify that the attached Order Denying Discretionary Review, Entered March 13, 1979, in the matter of John W. McTighe vs. University of the Americas Foundation, Inc., et al., File No. 78-SC-598-D (Court of Appeals File No. 78-CA-109-MR), (Jefferson Circuit Court #231158), is a true and correct copy of the original order as it appears on file in my office.

Done this 22nd day of May, 1979, at Frankfort, Kentucky.

Martha Layne Collins, Clerk
By (s) Betty Whitton
Chief Deputy Clerk

(Seal)

OPINION RENDERED: AUGUST 25, 1978

COURT OF APPEALS OF KENTUCKY

File No. 78-CA-109-MR

JOHN W. McTIGHE

v.

UNIVERSITY OF THE AMERICAS FOUNDATION, INC., ET AL.

File No. 78-CA-109-MR

Appeal from Jeffersn Circuit Court
Action No. 231158

MANDATE

The opinion rendered on the above date, a copy of which is attached hereto and made a part hereof, is now final. It appearing that there is no error in the judgment of the Circuit Court, it is therefore the mandate of this Court that said judgment is hereby AFFIRMED.

OCTOBER 20, 1978—Appellant's Petition for Rehearing Denied.

MARCH 13, 1979—Movant's Motion for Discretionary Review Denied by Supreme Court.

A Copy—Attest:

(s) John S. Scott
Clerk

Issued March 16, 1979

[LETTERHEAD OF BRESCIA COLLEGE]
April 13, 1977

Senor Fernando Macias Rendon, President
Universidad de las Americas
Apartado Postal 507
Puebla, Pues. Mexico

Dear Sir:

I am writing this letter of inquiry in an attempt to understand what has been happening at the University of the Americas.

In 1972 I wrote recommendations for two of our own graduates who planned to major in Latin American Studies in the University of the Americas Graduate School. Both, Paul Rogier and John McTighe, intended to work for the Master of Arts degree.

Having waited over a full year after completing his degree requirements at your University, Paul Rogier finally received his degree this March; which, I might add, was awarded *cum laude*. Waiting a year for his degree was frustrating enough for Paul; but John's experience at the University of the Americas sounds almost unbelievable.

John returned from the University in the spring of 1976. According to the account he related to various faculty members and students here he was expelled from the University of the Americas because he participated in a strike at the University. He said that the strike included members of the faculty, the student body and a union known as the Union of Workers and Employees of the University of the Americas. He also said that the striking faculty were fired, that students were expelled, and that some students who had finished all degree requirements were refused their degrees. He maintained that his own transcripts were being held and possibly altered and that now he has no hope of completing his degree.

I fully realize, Sir, that John may be giving only a student's view of the proceedings at the University so I would very much appreciate knowing from someone in authority what the situation was and is. Also John is currently asking for my recommendation to help him secure a job in the secondary teaching field. If you are aware of any reason why I should not grant such a recommendation I would appreciate knowing such.

A speedy response from you in this matter would be greatly appreciated.

Sincerely,

(s) Sister Rose Jean Powers
Instructor in History

[LETTERHEAD OF UNIVERSIDAD DE LAS AMERICAS]

May 9, 1977

Sister Rose Jean Powers
Instructor of History
Brescia College
Owensboro, Kentucky 42301
U.S.A.

Dear Sister Rose Jean,

Thank you very much for your letter of 13 April 1977 in which you speak in behalf of John McTighe's request for a transcript. Let me begin by saying the Mr. McTighe was sent a transcript on 19 April, accompanied by a letter from the Assistant to the Registrar. May I say also that this office has never received a request for a transcript either. I wish that Mr. McTighe would write to me stating exactly to whom he sent the letters requesting a transcript. It all seems very strange.

And one other statement that you make causes me great concern. You say that he maintains that his transcripts

were "possibly altered and that now he has no hope of completing his degree". I assume that you have contact with Mr. McTighe. If you do, please tell him to give me any information regarding this possibility. It simply is not true that anything of that nature could have or would have happened. It is unfortunate but it is a fact: former professors and students have been misrepresenting the University. May I be blunt? These former professors and students have lied about the University.

Perhaps, I better than anyone, now know more of what happened during the crisis which we had here. A nucleus of employees and students aligned themselves with communist elements that openly tried to close this private institution and nationalize it. I have been for the last six months conducting research in order to write the official history of the occupation that nearly destroyed this university.

Mr. McTighe, as a foreigner in this country, did a very foolish thing when he became involved in a political entanglement. I, myself, would not recommend anyone who was involved in the attempt to overthrow this school and turn it over to elements which would alter it for political reasons. And I will not permit Mr. McTighe to hide behind a veil of innocence. From my research, I know now that the aims to destroy us were common knowledge. I, personally, would not recommend anyone of that inclination to teach in any school or, for that matter, hold any position where confidence is a requirement.

Sister, you may do as you wish. But I am giving you the facts. If you wish to confirm them, I request that you write to Dr. Gordon Sweet, Executive Secretary of the Commission of Colleges of the Southern Association of Colleges and Schools. (Is that the same agency that accredits Brescia College?) He will, I am certain, be most helpful in confirming what I have written to you.

I am sorry to have been so blunt in my response to you. But I have been silent for a long time. Never once did we take the offensive during the takeover. I said very little when I was thrown out of my home, which is located on the campus, by Mr. McTighe's compatriots. My colleagues nd I simply moved to apartments and hotels in order to avoid any kind of incident which might have been deadly. If you know Latin America, you will know that such a happening is most possible. Never once did those loyal to the University attempt to strike back, even when slanderous documents were published and distributed throughout the city or when threatening slogans were painted on the walls of the city.

No. We moved into buildings in Puebla and continued to teach our classes. You must remember that Mr. McTighe and his group closed this university to our students. For five months, because they wanted to destroy us, they deprived students who wanted to learn the use of the library, the laboratories, and the classrooms. This is what they did.

Let me try to make one more point very clear. We have tried our very best to live up to the agreement that was signed to end the crisis. Accordingly, we have graduated persons who were directly involved in the attempt to destroy the school, including two wives who actively participated with their professor husbands. And other students are according to the agreement: Anyone who needs 15 credits or less to be graduated has the right to transfer those credits from an approved institution and receive his degree from the University. Let me repeat. All is being done according to the agreement that was signed.

Finally, Mr. McTigue recently contacted his congressman, the Honorable *Romano L. Mazzoli M.C.* and told him what, I suppose, he told you. In an attempt to clarify the University's position, the President of the University, Ing.

Fernando Macias Rendon, and the Vice-President for Administrative Affairs, Dr. Harold L. Kirkpatrick, made a visit to Congressman *Mazzoli's* offices in Washington and spent some time visiting with his staff. The Congressman has now been given the entire story.

Sister, I have taken a great deal of your time explaining this matter and to answer your most understanding letter. I hope that you can see why. It is most important for us that you realize what we are doing for our students. During the occupation of the campus, an editorial was published in the nation's largest newspaper, *Excelsior* that denounced the closing of any university by strikes called by selfish and self-serving interests. It said, in effect, that every day a university in Mexico is closed, the nation takes a step backward because that day can never be recaptured.

Your ex-student may have been a Latin American Studies major, but he seems to have very little positive interest in Mexico.

Foreign students such as Mr. McTighe whatever their potential, we do not want.

Yours most sincerely,

(s) Edward Simmen, Director
Division of Graduate Studies

c.c. Ing. Fernando Macias Rendon, Rector
Dr. Harold L. Kirkpatrick, Administrative
Vice-President
Dr. Gordon Sweet
Southern Association of Colleges and Schools
795 Peachtree Street. N.E.
Atlanta, Georgia. 30308
The Honorable Romano L. Mazzoli
The United States of America
Washington, D. C.

ES/grl.

MISCELLANEOUS PRACTICE PROVISIONS

454.210. Personal jurisdiction of courts over nonresidents—Process, how served—Venue.—(1) As used in this section, "person" includes an individual, his executor, administrator, or other personal representative, or a corporation, partnership, association, or any other legal or commercial entity, who is a nonresident of this commonwealth.

(2) (a) A court may exercise personal jurisdiction over a person who acts directly or by an agent, as to a claim arising from the person's:

1. Transacting any business in this commonwealth;

2. Contracting to supply services or goods in this commonwealth;

3. Causing tortious injury by an act or omission in this commonwealth;